No. 86-1690

In The

Supreme Court of the United States

October Term, 1986

QUENTIN MEADOWS,

Petitioner,

vs.

ROBERT H. KUHLMANN, Superintendent, Sullivan Correctional Facility, Fallsburg, New York, ROBERT ABRAMS, Attorney General of New York, and DENIS DILLON, District Attorney of Nassau County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Were petitioner' s rights under the Sixth and Fourteenth Amendments of the United States Constitution violated, when at his trial for two robberies, evidence of a lineup identification of the petitioner by one victim to one of the robberies was admitted despite the fact that petitioner's trial counsel, who was notified of the court-ordered, post-indictment lineup, failed to appear at the lineup?

2. Do the Sixth and Fourteenth Amendments of the United States Constitution prohibit the impeachment of the petitioner at trial with his post-arrest statements, obtained following the administration of the *Miranda* warnings but in violation of the New York State laws governing the right to counsel?

3. Did the Court of Appeals for the Second Circuit err in finding that the State's introduction at petitioner's trial of a witness's identification of petitioner at a post-indictment, uncounseled lineup and the State's use of petitioner's statements, obtained in violation of New York State's laws governing the right of counsel, to impeach petitioner were harmless beyond a reasonable doubt?

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BRIEF FOR RESPONDENTS

STATEMENT OF OPINIONS BELOW AND JURISDICTION

The petitioner has adequately set forth the opinions of the courts below, which are reproduced in the appendices of the petition.

The petitioner has also adequately stated the jurisdictional basis upon which he is seeking certiorari.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section One of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Twice within eight days in October 1980, the petitioner robbed

the same gas station in Nassau County, New York. On the first occasion, October 21, 1980, the petitioner robbed the station's attendant, John Taylor, and his cousin, James Alviti, at gunpoint. The next day, the victims identified the petitioner as the robber from a photopack and from an array of sixteen photographic slides.[1] Eight days later, on October 29, 1980, the petitioner returned to the gas station. At gunpoint, he again robbed Taylor and also robbed another fellow employee, Vincent Rizzuto.

Taylor called the police and, having recognized the petitioner from the first robbery, told them that the petitioner had robbed him a second time. Both Taylor and Rizzuto identified the petitioner from a photopack as the person who had just robbed them.

On November 7, 1980, the petitioner was arrested pursuant to a warrant and confessed, after having been given the *Miranda* warnings and waiving his rights, to having committed both robberies. Subsequently, the petitioner was indicted. On May 19, 1981, a court-ordered lineup in which the petitioner participated was held. Rizzuto was the only one of the three victims present. He identified the petitioner as the man who had robbed him on October 29, 1980. Although petitioner's attorney had been notified of the scheduled lineup and the lineup was held up for a time while the police made further attempts to contact the attorney, he did not attend.

The petitioner moved to suppress the identifications and his post-arrest statement. The hearing court found that neither photographic arrays (photopack and slides), nor the lineup was unduly suggestive. Furthermore, the court found that "each of

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1. These facts except where noted, are paraphrased, or quoted, from the opinion of the New York Court of Appeals (64 N.Y. 2d 956), which is also set forth beginning at 9A of the petitioner's Appendix C.

the three victims had an independent source for in-court identifications, based on their observations during the robberies." *People v. Meadows*, 64 N.Y. 2d 956, 957 (1985) (10A-11A).[2] The court reached the conclusion that the petitioner had not been denied his right to counsel at the lineup because of his attorney's refusal to be present. The court also found that the petitioner's statements were not admissible on the State's direct case, because, under New York law, an arrest warrant "indelibly" attaches the right to counsel, which may not thereafter be waived in the absence of counsel. However, the court further held that the statements could be used at trial to impeach his credibility.

At trial, Taylor, Alviti and a third witness to the first robbery testified. Taylor and Alviti identified the petitioner as the person who had robbed them; the third witness was not able to make an identification. In regard to the second robbery of October 29, 1980, Taylor and Rizzuto both testified and identified the petitioner as the robber. Rizzuto also testified to having identified the petitioner at the lineup.

The petitioner testified at trial that he had not committed the robberies. The prosecutor impeached the petitioner's testimony on cross-examination with his prior admissions. Also, on rebuttal, the prosecutor called the policeman, Detective Howell, who had taken the petitioner's statements. Detective Howell testified that the petitioner had admitted committing the robberies, thereby also impeaching the petitioner's testimony.

The petitioner raised these issues on appeal in the Supreme Court of the State of New York, Appellate Division, Second Department. That court unanimously affirmed the judgment of conviction without opinion. *People v. Meadows*, 102 A.D. 2d

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2. The numbers in parentheses, followed by the letter "A," refer to those pages of the petitioner's Appendix C.

1016 (2d Dept. 1984). The New York Court of Appeals granted the petitioner leave to appeal [62 N.Y. 2d 988 (1984)], and on March 21, 1985, after considering the same issues which had been raised below, including those raised here, that court held that "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams*, 53 N.Y. 2d 241, 252)." *People v. Meadows*, 64 N.Y. 2d 956, 958 (1985) (12A). That court also found that the petitioner's statements were properly used for impeachment purposes. *Ibid.*

Thereafter, petitioner petitioned this Court for a writ of certiorari to the Court of Appeals of the State of New York. The petition was denied on October 7, 1985. *Meadows v. New York*, ____ U.S. ____, 106 S. Ct. 69 (1985).

Petitioner next filed a federal habeas corpus petition in the United States District Court for the Eastern District of New York. Petitioner sought issuance of the writ on two grounds: (1) "A lineup viewing by a key witness was conducted in the absence of counsel several months after counsel had appeared in the matter"; and (2) "The petitioner was improperly impeached by the use of an alleged admission taken in violation of his right to counsel." *Meadows v. Kuhlmann*, 644 F. Supp. 757, 758 (E.D.N.Y. 1986) (15A). The district court (Platt, J.) found the petitioner's claims to be without merit and dismissed the petition. *Meadows v. Kuhlmann, supra*, 644 F. Supp. at 763 (37A). With regard to petitioner's claim that the lineup identification was obtained in violation of his Sixth Amendment right to counsel, the court found that no such violation had occurred; hence, the admission into evidence at trial of the in-court identification of the one witness who viewed the lineup, as well as that witness's identification of petitioner at the lineup, was proper. In finding no violation of the right to counsel, the District Court stated:

To rule in petitioner's favor on the facts of this

> case would greatly impair the administration of justice and in the long run cause harm to other defendants. The Supreme Court's ruling in *Gilbert* [v. State of California, U.S. 263 (1967)] and other cases such as *United States v. Wade,* 388 U.S. 218 . . . (1967), were meant to encourage counseled lineups in order to insure proper identifications. If this Court were to allow the exclusion of lineups based on the recalcitrance of counsel, law enforcement authorities might be forced to use other, more suggestive procedures, resulting in more miscarriages of justice.

Meadows v. Kuhlmann, supra, 644 F. Supp. at 760 (24A-25A).

With respect to petitioner's statement, obtained after the administration of the *Miranda* warnings [*Miranda v. Arizona,* 366 U.S. 436 (1966)] but in violation of New York State's laws governing the right to counsel [*see People v. Samuels,* 49 N.Y. 2d 218 (1980)], which was used to impeach his trial testimony, the District Court, relying on the Second Circuit Court of Appeals's decision in *United States v. Duvall,* 537 F. 2d 15 (2d Cir.), *cert. denied,* 426 U.S. 950 (1976), found that petitioner's right to counsel did not attach upon the issuance of the arrest warrant. Hence, there being no right to counsel, the holding of *United States v. Brown,* 699 F. 2d 585 (2d Cir. 1983), where the court "held that a statement taken in violation of a defendant's Sixth Amendment right to counsel could not be used for impeachment purposes even if the strictures of *Miranda* had been complied with" [*Meadows v. Kuhlmann, supra,* 644 F. Supp. at 761 (28A-29A)], did not apply.

Judge Platt then granted a certificate of probable cause. On appeal to the United States Court of Appeals for the Second Circuit, petitioner raised the same arguments he had made in state

court and in the District Court. The Second Circuit Court of Appeals disagreed with the District Court and found that the identification made at the post-indictment lineup, "held in the absence of defense counsel, was in derogation of [petitioner]'s constitutional rights" *Meadows v. Kuhlmann,* 812 F. 2d 72, 76 (2d Cir. 1987) (45A). The court, however, found the admission into evidence of the witness's lineup identification was harmless beyond a reasonable doubt. The court credited the state court determination that there existed an independent basis for the witness's in-court identification and found that the evidence of guilt was overwhelming. *Meadows v. Kuhlmann, supra,* 812 F. 2d at 76 (45A-46A).

As to the use of petitioner's incriminating statements for purposes of impeachment, the Second Circuit Court of Appeals again disagreed with the District Court. The court found that pursuant to New York law [N.Y. Crim. Proc. Law § 100.05 (McKinney's 1981)] a criminal action, upon which the Sixth Amendment right to counsel attached, commenced with the filing of an accusatory instrument, including a felony complaint. Thus, petitioner's right to counsel had attached in the case at bar with the filing of the felony complaint. Hence, the court found, on the constraint of its decision in *United States v. Brown,* 699 F. 2d 585 (2d Cir. 1983), where it "held that, absent a valid waiver, the use of a statement taken in derogation of a defendant's right to counsel was absolutely prohibited, not only in the government's case-in-chief, but as impeachment evidence as well" (*id.* at 590), that the state trial judge's decision allowing the prosecution to impeach the petitioner with incriminating statements taken in the absence of counsel was constitutionally infirm. *Meadows v. Kuhlmann, supra,* 812 F. 2d at 77 (49A).

The court, however, found that "[i]n contradistinction to the facts in *Brown,* it is utterly unreasonable to suggest that the impeachment evidence played a critical role in the jury's decision

in the instant case" *Meadows v. Kuhlmann, supra,* 812 F. 2d at 77 (49A). Consequently, the court held that the error in admitting petitioner's incriminating statements was harmless beyond a reasonable doubt.

ARGUMENT

I.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

The petition sets forth three grounds: one involving a claim of a denial of the right to counsel, which purportedly rendered a post-indictment lineup identification inadmissible; another concerning the allegedly improper use of a statement, obtained in violation of petitioner's right to counsel solely for impeachment purposes; and the third, involving whether violations of petitioner's right to counsel as to the lineup identification and the use of his incriminating statements were harmless beyond a reasonable doubt. The Second Circuit Court of Appeals decided the first two issues against the respondents but affirmed the District Court's denial of a writ of habeas corpus because it found the errors, albeit of constitutional magnitude, to be harmless beyond a reasonable doubt. Although the petitioner was ultimately unsuccessful in his collateral attack on his state conviction, the issues he raised that were decided against the respondents represent questions of importance which would justify the granting of certiorari.

A. The Petitioner's Statement, Although Obtained in Violation of His State Right to Counsel, Was Admissible at Trial for Impeachment Purposes.

The petitioner was arrested pursuant to an arrest warrant, informed of his constitutional rights and, upon waiving them,

gave a statement inculpating himself. This statement could not be used by the prosecution on their direct case because at the time it was made the petitioner's right to counsel had already attached under New York law, and he had not waived his right to counsel, in the presence of counsel. *People v. Samuels,* 49 N.Y. 2d 218 (1980). After the petitioner had testified at trial and had denied having committed the robberies, however, the prosecutor impeached the petitioner's testimony by using that statement both on cross-examination and on rebuttal under the authority of *Harris v. New York,* 401 U.S. 222 (1971) and *Oregon v. Haas,* 420 U.S. 714 (1975). This procedure was approved by the New York State Court of Appeals. *People v. Meadows,* 64 N.Y. 2d 956, 958 (1985) (12A).

Relying on its decision in *United States v. Brown,* 699 F. 2d 595 (2d Cir. 1983), the Second Circuit Court of Appeals found it was constitutionally erroneous to permit the State to impeach the petitioner with his statements obtained in violation of his right to counsel under the Sixth Amendment. The court's decision, based on its interpretation of holdings by this Court, is wrong.

In *United States v. Brown, supra,* the court decided that post-indictment, pre-arraignment statements from a defendant, which were taken in violation of his Sixth Amendment right to counsel, could not be used for the purpose of impeaching a defendant who testified. The court based its decision on this Court's ruling in *New Jersey v. Portash,* 440 U.S. 450 (1979). There, the defendant had been granted use immunity and had testified before a grand jury. Subsequently, criminal charges were brought against him, and the court before which he was tried ruled that the government could use his grand jury testimony to impeach his credibility if he testified, which he ultimately did not do because of the court's ruling. The Court recognized that there, as in *Harris v. New York,* 401 U.S. 222 (1971), the State had an interest in preventing perjury, and in not legitimizing it, by allowing

impeachment of a defendant's credibility with the use of prior inconsistent statements. However, the Court drew a distinction between the situations presented in *Portash* and in *Harris* and *Mincey v. Arizona*, 437 U.S. 385 (1978). In *Harris*, the defendant's statements could be used for impeachment purposes because although obtained in violation of his rights under *Miranda*, they were otherwise voluntary. In *Mincey*, the defendant's statements could not be used on cross-examination because they were not given voluntarily. In *Portash*, the court found that testimony given under the grant of immunity is "the essence of coerced testimony," and thus, in accordance with its holding in *Mincey*, its use was impermissible under the Fifth Amendment. *New Jersey v. Portash, supra*, 440 U.S. at 459.

In *Brown*, the court pointed to that part of this Court's decision in *Portash* at 440 U.S. at 459, which stated:

> Balancing interests was thought to be necessary in *Harris* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary, it is impermissible.

United States v. Brown, supra, 699 F. 2d at 590. The court then drew a distinction between statements which were obtained in violation of *Miranda* rights and those obtained in violation of the constitutional right to counsel. Because *Miranda* safeguards are not constitutionally compelled, the court reasoned, statements which are taken in violation of those rights could properly be used for impeachment purposes. But, because the Sixth Amendment provides for the right to counsel, statements obtained in violation of that guarantee are not usable.

Portash should not be given the broad interpretation which the court in *Brown* has afforded it. This Court's analysis in that case rested on the involuntary nature of Portash's statements, rather than on the violation of a constitutional right. *See, United States v. Havens,* 446 U.S. 620 (1980) [evidence suppressed due to an illegal search and seizure can be used to impeach a defendant's testimony].

Furthermore, statements obtained in violation of the right to counsel merely because they were taken after a felony complaint was filed are not involuntary or untrustworthy in the same way as those which are involuntary due to the exercise of physical or psychological coercion [*Mincey v. Arizona, supra,* 437 U.S. at 401-402], or due to the threat of a conviction of contempt. *New Jersey v. Portash, supra,* 440 U.S. 450; *People v. Caban,* 79 A.D. 2d 1031 (2d Dept. 1981). The former is a case which is much more closely related to the situation in *Harris*, where a balancing test was employed to weigh the interests in deterring unlawful police conduct and those in preventing perjury from occurring before the fact-finders. Those "considerations which make a compelled statement [which the one in the instant case is not] inadmissible for any purpose, including cross-examination, are simply not applicable . . . . " *People v. Monaghan,* 118 Misc. 2d 326, 328 (Sup. Ct. Monroe Cty. 1983). *See also, People v. Meadows, supra,* 64 N.Y. 2d at 958; *People v. Maerling,* 64 N.Y. 2d 134, 140 (1984) (admissibility of statements obtained in violation of the defendant's Sixth Amendment right to counsel for impeachment purposes "rests not on whether a constitutional right is implicated but on a determination of voluntariness. If the statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable" [citations omitted]).

In the case at bar, the petitioner's statement was not

involuntary in the traditional sense, nor was it untrustworthy.[3] Thus, the trial court correctly determined that it could be used for impeachment purposes.

The conflict between the New York State Court of Appeals and the United States Court of Appeals for the Second Circuit, which encompasses New York State, over the propriety of impeaching a defendant with his voluntary statements taken in violation of his right to counsel is one that should be resolved by this Court. *See Andresen v. Maryland,* 427 U.S. 463, 470 n. 5 (1976); *Lego v. Twomey,* 404 U.S. 479, 479 n. 1 (1972).

B. The Admission of Testimony Concerning One Victim's Identification of the Petitioner at a Lineup Conducted in the Absence of Counsel Did Not Violate Any of the Petitioner's Constitutional Rights.

Subsequent to indictment, the trial court ordered a lineup to be conducted. The petitioner's counsel was notified of the date, but, despite this notification, and telephone calls which were placed to his office on the morning of the lineup, counsel was not present when the lineup was conducted later that day.

At trial, the single witness who viewed the lineup, Vincent Rizzuto, identified the petitioner as the person who robbed him on October 29, 1980. He also testified to having identified him at the lineup. His testimony, however, was not the only evidence connecting the petitioner with the commission of the crime. John Taylor, who was also robbed on that date, identified the petitioner

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3. The hearing court so found, and the state appellate courts affirmed. Although the federal courts are empowered to make their own determination of voluntariness [*Miller v. Fenton,* ____ U.S. ____, 106 S. Ct. 445 (1985)], the District Court, as implicit in its decision upholding the use of the statement on cross-examination, also found the statement to have been voluntarily given.

as the perpetrator. His testimony was crucial. Taylor also testified that it was the petitioner who had robbed him at the same location only eight days before, and that he recognized the petitioner at the time of the second robbery from the first crime. There was yet another eyewitness at trial. This third witness, James Alviti, had been present at the first robbery and testified that it had been the petitioner who had committed that crime.

Prior to trial, a suppression hearing had been held. The court found that Rizzuto, Taylor and Alviti all had sufficient independent bases for their in-court identifications of the petitioner. The petitioner failed to present any evidence at the hearing concerning why his attorney had absented himself from the lineup. The hearing court found that counsel had waived his presence at the lineup and ruled that to suppress Rizzuto's testimony concerning the lineup identification solely because of counsel's absence would, in effect, sanction an abuse of the legal system, since counsel had a chronic record of non-attendance in court. Such a determination was not without precedent within New York State [*see People v. Styles,* 90 Misc. 2d 861 (S. Ct. N.Y. Cty. 1977), *aff'd,* 71 A.D. 2d 1066 (1st Dept. 1979)] or in other jurisdictions. *Cf., Jenkins v. State,* 167 Ga. App. 840, 308 S.E. 2d 14, 16 (1983) ("Counsel for defendant made a conscious decision not to attend the lineup. He may not now complain.").

Policy reasons for sustaining this determination aside, the New York Court of Appeals did not squarely address the issue of forfeiture or waiver. Rather, the court avoided the issues by holding any error to be harmless. The court stated, "[i]n the face of three in-court identifications by eyewitnesses, *the evidence of Rizzuto's lineup identification added little to the already overwhelming evidence of guilt.*" *People v. Meadows,* 64 N.Y. 2d 956, 958 (1985) (12A) (emphasis supplied). Therefore, the court continued, "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams,* 53 N.Y. 2d 241, 252)." *Ibid.*

The federal district court, however, agreed with the state trial judge and, in dismissing petitioner's *pro se* petition for a writ of habeas corpus, quoted the state trial judge (Harrington, J.):

> [I]t is worthy of observation that Mr. Horan [petitioner's original counsel] has not appeared during the course of this hearing to offer any testimony indicating that he did not have any notice of the proposed lineup or sought any adjournment of the same. . . . Counsel cannot ignore his obligation to the defendant and thereby frustrate every effort to have this matter proceed in an orderly fashion. To find otherwise would give counsel license to merely ignore motions, directives of this Court and have it all inure to the benefit of his client. That obviously cannot be sanctioned and it is not sanctioned.

Meadows v. Kuhlmann, 644 F. Supp. 757, 760 (E.D.N.Y. 1986) (23A-24A) (brackets in text quoted). The District Court found the remarks of the state court trial judge to "make a good deal of sense" [*Meadows v. Kuhlmann, supra*, 644 F. Supp. at 760 (24A)], adding:

> To rule in petitioner's favor on the facts of this case would greatly impair the administration of justice and in the long run cause harm to other defendants. The Supreme Court's rulings in *Gilbert* and other cases involving identification issues, such as *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), were meant to encourage counseled lineups in order to insure proper identifications. If this Court were to allow the exclusion of lineups based on the recalcitrance of counsel, law enforcement authorities might be

> forced to use other, more suggestive procedures, resulting in more miscarriages of justice.

(24A-25A); *Meadows v. Kuhlmann, supra* at 760 (24A-25A).

The Second Circuit Court of Appeals found that the identification at the post-indictment lineup, "held in the absence of defense counsel, was in derogation of [petitioner]'s constitutional rights" *Meadows v. Kuhlmann,* 812 F. 2d 72, 76 (2d Cir. 1987) (45A). In reaching its conclusion, the court did not address the issue of waiver and forfeiture upon which the District Court's finding was premised. The ruling of the Second Circuit Court of Appeals on this issue could have serious repercussions. In effect, its decision gave its imprimatur to defense counsel's unexplained failure to appear at a court-ordered lineup. To hold defense counsel to the performance of his duties when given a month's notice of a lineup and to require him to either be present, ask for an adjournment, arrange for substitute counsel, or explain his failure to do any of the above is not unduly onerous. Rewarding a defendant for the recalcitrance of his attorney through the suppression of an out-of-court identification encourages such dereliction of duty by counsel by making it inure to the petitioner's benefit. Put another way, it might be said that to penalize the State for inaction by counsel in such a situation as this in effect uses the exclusionary rule, a prophylactic device designed to further respect for constitutional rights on the part of governmental authority, as a sword rather than a shield. Hence, this case presents this Court with an opportunity to delineate the circumstances under which the state will be penalized for the recalcitrance of defense counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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